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**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1946.**

**WALTER A. LAVENDER, Administrator**  
**De Bonis Non of the Estate of L. E.**  
**Haney, Deceased,**

**Petitioner,**

**vs.**

**J. M. KURN et al., Trustees of the St. Louis-**  
**San Francisco Railway Company, Debtor,**  
**and ILLINOIS CENTRAL RAILROAD**  
**COMPANY,**

**Respondents.**

**No. 427.....**

**(No. 550. October Term, 1945.)**

**PETITION FOR WRIT OF CERTIORARI**

**To the Supreme Court of Missouri**

**and**

**SUGGESTIONS IN SUPPORT THEREOF.**

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## INDEX.

	Page
Petition for writ of certiorari.....	1-10
Preliminary .....	1
Opinion of court below.....	2
Summary statement of the matter involved.....	2
Jurisdiction of this Court.....	5
Cases thought to sustain the jurisdiction of this Court .....	7
Questions presented .....	7
Reasons relied on for the allowance of the writ....	8
Prayer for the writ.....	10
Brief in support of petition for writ of certiorari....	11-23
Statement of the case.....	11
Specifications of error to be urged.....	11
Summary of the argument.....	13
Argument .....	14
I. The Supreme Court of Missouri in its judg- ment and opinion of June 10, 1946, proceeded inconsistent with, and failed to follow, the judgment, opinion and mandate of this Honor- able Court .....	14
II. This Honorable Court has power to give effect to its mandates and judgments.....	17

### Cases Cited.

Lavender v. Kurn, ... U. S. ..., 90 L. Ed. 692, 66 Sup. Ct. 740 .....	7, 13
Magwire v. Tyler, 17 Wall. (84 U. S.) 253, 21 L. Ed. 576 .....	7, 13, 18, 19-21
Martin v. Hunter's Lessee, 1 Wheat. (14 U. S.) 304, 4 L. Ed. 97.....	7, 13, 18

### Statutes Cited.

Federal Employers' Liability Act (45 U. S. C. A., Sec. 51) .....	6
Judicial Code, Sec. 237 (28 U. S. C. A., Par. 344) ..	5, 17, 18

# INDEX

Page

1	Introduction
2	Object of the work
3	Scope of the work
4	Method of work
5	Results of the work
6	Conclusions
7	References
8	Appendix
9	Index
10	Summary
11	Notes
12	Tables
13	Figures
14	Plates
15	Maps
16	Photographs
17	Diagrams
18	Formulas
19	Equations
20	Tables of contents
21	Index of subjects
22	Index of names
23	Index of places
24	Index of dates
25	Index of events
26	Index of persons
27	Index of objects
28	Index of actions
29	Index of qualities
30	Index of quantities
31	Index of relations
32	Index of contrasts
33	Index of similarities
34	Index of differences
35	Index of causes
36	Index of effects
37	Index of means
38	Index of ends
39	Index of purposes
40	Index of results
41	Index of consequences
42	Index of conditions
43	Index of circumstances
44	Index of situations
45	Index of states
46	Index of conditions
47	Index of circumstances
48	Index of situations
49	Index of states
50	Index of conditions

## Table of contents

1	Introduction
2	Object of the work
3	Scope of the work
4	Method of work
5	Results of the work
6	Conclusions
7	References
8	Appendix
9	Index
10	Summary
11	Notes
12	Tables
13	Figures
14	Plates
15	Maps
16	Photographs
17	Diagrams
18	Formulas
19	Equations
20	Tables of contents
21	Index of subjects
22	Index of names
23	Index of places
24	Index of dates
25	Index of events
26	Index of persons
27	Index of objects
28	Index of actions
29	Index of qualities
30	Index of quantities
31	Index of relations
32	Index of contrasts
33	Index of similarities
34	Index of differences
35	Index of causes
36	Index of effects
37	Index of means
38	Index of ends
39	Index of purposes
40	Index of results
41	Index of consequences
42	Index of conditions
43	Index of circumstances
44	Index of situations
45	Index of states
46	Index of conditions
47	Index of circumstances
48	Index of situations
49	Index of states
50	Index of conditions

## Table of contents

1	Introduction
2	Object of the work
3	Scope of the work
4	Method of work
5	Results of the work
6	Conclusions
7	References
8	Appendix
9	Index
10	Summary
11	Notes
12	Tables
13	Figures
14	Plates
15	Maps
16	Photographs
17	Diagrams
18	Formulas
19	Equations
20	Tables of contents
21	Index of subjects
22	Index of names
23	Index of places
24	Index of dates
25	Index of events
26	Index of persons
27	Index of objects
28	Index of actions
29	Index of qualities
30	Index of quantities
31	Index of relations
32	Index of contrasts
33	Index of similarities
34	Index of differences
35	Index of causes
36	Index of effects
37	Index of means
38	Index of ends
39	Index of purposes
40	Index of results
41	Index of consequences
42	Index of conditions
43	Index of circumstances
44	Index of situations
45	Index of states
46	Index of conditions
47	Index of circumstances
48	Index of situations
49	Index of states
50	Index of conditions

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

WALTER A. LAVENDER, Administrator  
De Bonis Non of the Estate of L. E.  
Haney, Deceased,

Petitioner,

vs.

J. M. KURN et al., Trustees of the St. Louis-  
San Francisco Railway Company, Debtor,  
and ILLINOIS CENTRAL RAILROAD  
COMPANY,

Respondents.

No. ....

(No. 550. October Term, 1945.)

## PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Missouri.

To the Honorable Chief Justice and Associate Justices of  
the Supreme Court of the United States:

Comes now Walter A. Lavender, administrator de bonis non of the estate of L. E. Haney, deceased, and respectfully petitions this Honorable Court to grant a writ of certiorari to review the judgment and opinion of the Supreme Court of Missouri, Division No. 1, rendered and entered on the 10th day of June, 1946, in the case lately pending in said Supreme Court of Missouri, Division No. 1, styled Walter A. Lavender, administrator de bonis non of the estate of L. E. Haney, deceased (plaintiff), respondent, vs. J. M. Kurn et al., trustees of the St. Louis-San Francisco Railway Company, debtor, and Illinois Central Railroad

Company, a corporation (defendants) appellants, being No. 39,174 of causes on the docket of said Supreme Court of Missouri (R. 2-3), reversing the judgment of \$30,000.00 and costs of the Circuit Court of the City of St. Louis, Missouri, in said cause in favor of your petitioner and against the respondents herein and remanding said cause for a new trial, which said judgment of the Supreme Court of Missouri, Division No. 1, became final on the 8th day of July, 1946, by the overruling by said court of petitioner's Motion to Set Aside the Judgment of said court and to follow the mandate of this Honorable Court or to grant petitioner a rehearing or to transfer said cause to the Supreme Court of Missouri en banc (R. 22).

### **OPINION OF COURT BELOW.**

The opinion of Division 1 of the Supreme Court of Missouri in said cause of Walter A. Lavender, administrator de bonis non of the estate of L. E. Haney, deceased (plaintiff), respondent, vs. J. M. Kurn et al., trustees of the St. Louis-San Francisco Railway Company, debtor, and Illinois Central Railroad Company (defendants), appellants, which petitioner seeks to have reviewed is reported in 125 S. W. 2d at page 460, and appears on pages 3 to 8 of the transcript of the printed record filed herewith.

### **SUMMARY STATEMENT OF THE MATTER INVOLVED.**

As appears from the record in this cause now on file with this Honorable Court, petitioner, on March 3, 1944, obtained a jury verdict and judgment in the Circuit Court of the City of St. Louis against respondents under the Federal Employers' Liability Act for the sum of \$30,000.00, which judgment on appeal to the Supreme Court of Missouri was "reversed, annulled and for naught held and esteemed." The opinion of the Supreme Court of Missouri

is reported in 189 S. W. 2d 253. This Honorable Court granted a writ of certiorari to the Supreme Court of Missouri and the cause was argued before this Honorable Court on March 6th and 7th, 1946. As further appears from the opinion and judgment of record in this court, this Honorable Court reversed the judgment of the Supreme Court of Missouri and remanded the cause "for whatever further proceedings may be necessary not inconsistent with this opinion."

In its opinion it is respectfully submitted that this Honorable Court, after reviewing the evidence, issues and instructions of the entire case on its merits, held that it was "unable, therefore, to sanction a reversal of the jury's verdict against Frisco's trustees," that it would not "approve any disturbance in the verdict as to Illinois Central," and that the Supreme Court of Missouri must "abide by the verdict rendered by the jury" in this cause.

In its opinion this Honorable Court discussed the evidence admitted in the trial court of witness Drashman under the *res gestae* rule, holding in regard thereto:

"In view of the foregoing disposition of the case, it is unnecessary to decide whether the allegedly hearsay testimony was admissible under the *res gestae* rule. Rulings on the admissibility of evidence must normally be left to the sound discretion of the trial judge in actions under the Federal Employers' Liability Act. But inasmuch as there is adequate support in the record for the jury's verdict apart from the hearsay testimony, we need not determine whether that discretion was abused in this instance."

The respondents did not file a motion for a rehearing in this Court, and on May 1, 1946, this Honorable Court issued its mandate to the Supreme Court of Missouri, and said Court received and filed therein the said mandate on May 3, 1946 (R. 1).

Upon receipt of the mandate of this Honorable Court, the Supreme Court of Missouri, at the request of respondents herein, ordered the cause reargued and considered the effect which should be given to the said mandate. On June 10, 1946 (R. 2-3), the Supreme Court of Missouri, in direct conflict with the judgment, opinion and mandate of this Honorable Court, rendered its judgment that the judgment of the Circuit Court of the City of St. Louis rendered in this cause on March 3, 1944, be "reversed, annulled and for naught held and esteemed," and that "said cause be remanded to the Circuit Court of the City of St. Louis for further proceedings to be had therein, in conformity with the opinion of this court" (R. 3). On the same day, June 10, 1946, the Supreme Court of Missouri filed its opinion wherein it stated that "the cause must be retried" (R. 8).

In its opinion of June 10, 1946, the Supreme Court of Missouri reversed the judgment of the trial court on account of the admission of the res gestae statement testified to by witness Drashman, stating that it reversed the judgment "because of the admission of the evidence of the witness Drashman as to what the unnamed Illinois Central switchman told him" (R. 8). This Honorable Court held in its opinion in this case that the admissibility of such evidence "**must normally be left to the sound discretion of the trial judge** in actions under the Federal Employers' Liability Act," this court further holding that "inasmuch as there is adequate support in the record for the jury's verdict apart from the hearsay testimony, we need not determine whether that discretion was abused in this instance." The Supreme Court of Missouri, in its opinion of June 10, 1946, in further conflict with the judgment, opinion and mandate of this Honorable Court, reserved for future consideration the question of the excessiveness of the verdict and the question of the admissibility of evidence of witness Mee concerning the distance in which the train involved in the accident could have been stopped



(R. 8), which questions this Honorable Court had previously foreclosed by holding that "we are unable, therefore, to sanction a reversal of the jury's verdict against Frisco's trustees. Nor can we approve any disturbance in the verdict as to Illinois Central."

On June 24, 1946, petitioner filed in the Supreme Court of Missouri, his Motion to Set Aside the Judgment of said Court of June 10, 1946, and to follow the mandate of this Honorable Court, or to grant petitioner a rehearing or to transfer said cause to the Supreme Court of Missouri en banc (R. 8-21). On July 8, 1946, petitioner's said Motion was overruled (R. 22).

On July 12, 1946, petitioner filed with the Supreme Court of Missouri his Motion for a Stay of the Mandate of said court, which motion was sustained on July 12, 1946 (R. 22-24).

### **JURISDICTION OF THIS COURT.**

The jurisdiction of this Court is based upon Section 237 of the Judicial Code (28 U. S. C. A., Par. 344), providing that it shall be competent for this Court, by certiorari, to require that there be certified to it for review and determination any cause wherein a final judgment or decree has been rendered by the highest court of a State in which a decision could be had wherein a title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States.

The judgment of the Supreme Court of Missouri, Division No. 1, sought herein to be reviewed, was originally entered on June 10, 1946 (R. 3). A motion to set aside said judgment and to follow the mandate of this Honorable Court or to grant petitioner a rehearing or to transfer said cause from Division No. 1 to the Supreme Court

of Missouri en banc was filed on June 24, 1946, within the time provided by the rules of the Supreme Court of Missouri (R. 8), and said motion of petitioner was denied by said Division No. 1 of the Supreme Court of Missouri on July 8, 1946 (R. 22), which is the date on which the judgment of said Division No. 1 of the Supreme Court of Missouri in said cause became final. Division No. 1 of the Supreme Court of Missouri, upon its refusal to set aside its judgment and to follow the mandate of this Honorable Court or to grant petitioner a rehearing or to transfer the cause to the Court en banc, was the highest court of the State in which a decision could be had in said cause; and in said cause, petitioner specially set up and claimed a right under a Statute of the United States, namely, the Federal Employers' Liability Act (45 U. S. C. A., Section 51) (R. 20), which right was denied petitioner by said Supreme Court of Missouri, Division No. 1.

The jurisdiction of this Court is also based upon Section 262 of the Judicial Code (28 U. S. C. A., Par. 377), providing that this Court "shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of \* \* \* (its) jurisdiction, and agreeable to the usages and principles of law." The action of the Supreme Court of Missouri in rendering its judgment of June 10, 1946, reversing and annulling the judgment of March 3, 1944, of the Circuit Court of the City of St. Louis, which Circuit Court judgment this Court held in its judgment and opinion of March 25, 1946, should not be disturbed, makes it necessary in the exercise of its jurisdiction that this Honorable Court give effect to its judgment and opinion of March 25, 1946, rendered in this cause.

## **CASES THOUGHT TO SUSTAIN THE JURISDICTION OF THIS COURT.**

Lavender v. Kurn, ... U. S. ..., 90 L. Ed. 692, 66  
Sup. Ct. 740;

Martin v. Hunter's Lessee, 1 Wheat. (14 U. S.) 304,  
4 L. Ed. 97;

Magwire v. Tyler, 17 Wall. (84 U. S.) 253, 21 L. Ed.  
576.

## **QUESTIONS PRESENTED.**

The questions presented by petitioner's petition herein for a writ of certiorari are:

(1) Whether, in an action against railroad carriers under the Federal Employers' Liability Act (45 U. S. C. A. 51) to recover for the death of an employe of defendant railroads, the judgment, opinion and mandate of this Honorable Court, sustaining and affirming a jury verdict and judgment for petitioner in a trial court, by stating and holding that it would not "sanction a reversal of the jury's verdict against Frisco's trustees" and would not "approve any disturbance in the verdict as to Illinois Central," may be evaded and annulled by a judgment and opinion of the Supreme Court of Missouri reversing said verdict and judgment.

(2) Whether in an action against Railroad carriers under the Federal Employers' Liability Act for the injury and death of an employe, where this Honorable Court in its opinion reversed the judgment of the Supreme Court of Missouri and held that it would not disturb the jury verdict against said carriers and that the Supreme Court of Missouri must "abide by the verdict rendered by the jury," and where this Honorable Court in its opinion further held that it was unnecessary to decide whether the allegedly hearsay testimony of witness Drashman was

admissible under the res gestae rule, and further held that rulings on the admissibility of evidence must normally be left to the sound discretion of the trial judge under the Federal Employers' Liability Act, and further held that inasmuch as there was adequate support in the record for the jury's verdict apart from the hearsay testimony of said witness Drashman, this court need not determine whether the trial court abused such discretion, the Supreme Court of Missouri to which this Court directed its mandate ordering said State Supreme Court to take whatever proceedings may be necessary not inconsistent with the opinion of this Court, may nevertheless reverse and annul such jury verdict, and the judgment based thereon, because of the admission of said hearsay evidence of said witness Drashman, under the res gestae rule, and may further reopen questions for future consideration which this Court had determined finally and conclusively by its opinion after its consideration of the entire case on the merits.

### **REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.**

In this case petitioner claims the right to recover under the Federal Employers' Liability Act for the death of respondents' employee. Petitioner obtained a verdict and judgment against both respondents in the trial court and the Supreme Court of Missouri, on appeal, thereafter reversed said trial court judgment. On March 25, 1946 this Honorable Court held that the judgment obtained by petitioner in the trial court should not be disturbed, that it was unnecessary to decide in this case whether the allegedly hearsay testimony of witness Drashman was admissible under the res gestae rule, that rulings on the admissibility of evidence must normally be left to the sound discretion of the trial judge under the Federal Employers' Liability Act and that inasmuch as there was ade-

quate support in the record for the jury's verdict apart from the hearsay testimony of witness Drashman, this court need not determine whether the trial court abused its discretion in this case. This Honorable Court further held that the Supreme Court of Missouri must "abide by the verdict rendered by the jury." After the Supreme Court of Missouri, on June 10, 1946, reversed and annulled the judgment of, and the verdict in, the Circuit Court of the City of St. Louis of March 3, 1944, "because of the admission of the evidence of the witness Drashman," petitioner in his motion to the Supreme Court of Missouri to set aside its judgment and to follow the mandate of this Honorable Court, etc., called the attention of the Supreme Court of Missouri to its failure to follow the judgment, opinion and mandate of this Honorable Court and also called its attention to its evasion and annulment of the judgment, opinion and mandate of this Honorable Court. Said motion was denied by the Supreme Court of Missouri on July 8, 1946. Thereby petitioner was denied a right secured to him by the Constitution and laws of the United States, which denial calls for the issuance by this court of its writ of certiorari herein to bring before this Court for review the entire record of the Supreme Court of Missouri subsequent to its receipt of the mandate of this Honorable Court.

The Supreme Court of Missouri, Division No. 1, by its said judgment and opinion of June 10, 1946, denied petitioner a right specially set up and claimed by him as the administrator of decedent's estate under the Federal Employers' Liability Act, namely, the right to have his case submitted to a jury and the right to secure the benefit of a jury verdict after this Honorable Court has decided that such verdict should not be disturbed.

**PRAYER.**

Wherefore, petitioner prays that a writ of certiorari be issued by this Court directed to the Supreme Court of Missouri, to the end that said judgment and opinion of Division No. 1 of said Supreme Court of Missouri, rendered and entered on June 10, 1946, in said cause of Walter A. Lavender, administrator de bonis non of the estate of L. E. Haney, deceased, respondent, v. J. M. Kurn et al., trustees of the St. Louis-San Francisco Railway Company, debtor, and Illinois Central Railroad Company, a corporation, appellants, No. 39,174, be reviewed by this Court, as provided by law, and that upon such review said judgment be reversed, that the judgment of the Circuit Court of the City of St. Louis, rendered in this cause on March 3, 1944, be sustained and affirmed, and that this Honorable Court render a final judgment herein in favor of petitioner and against both respondents for the sum of \$30,000.00 with interest thereon at the rate of 6% per annum from March 3, 1944, and costs, and that this Honorable Court award execution thereon, and grant such other and further relief as may be appropriate.

N. MURRY EDWARDS,  
JAMES A. WAECHTER,  
DOUGLAS H. JONES,

Attorneys for Petitioner.

## **BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

In the opinion of the Supreme Court of Missouri, in said cause of Walter A. Lavender, Administrator de bonis non of the Estate of L. E. Haney, deceased (plaintiff), respondent, v. J. M. Kurn et al., trustees of the St. Louis-San Francisco Railway Company, debtor, and Illinois Central Railroad Company, a corporation (defendants), appellants, which petitioner herein seeks to have reviewed, is reported in 195 S. W. 2d at page 460 and appears on pages 3 to 8 of the transcript of the printed record filed herewith.

### **STATEMENT OF THE CASE.**

The essential facts of the case are stated in the petitioner's petition for a writ of certiorari, and in the interest of brevity are not repeated here. Reference will be made to such facts on the points involved in the course of the argument which follows.

### **SPECIFICATIONS OF ERROR TO BE URGED.**

The Supreme Court of Missouri, Division No. 1, in its said opinion in said cause erred:

(1) In holding and deciding that the admission of evidence of witness Drashman under the res gestae rule was erroneous after this Honorable Court in its opinion of March 25, 1946, had held that such question need not be decided and that rulings on the admissibility of such evidence must normally be left to the sound discretion of the trial judge in actions under the Federal Employers' Liability Act, and after this Honorable Court had further held that inasmuch as there was adequate support in the record for the jury's verdict apart from such evidence the



question of the trial court's abuse of its discretion need not be decided, and after this Court had held that "We are unable, therefore, to sanction a reversal of the jury's verdict against Frisco's trustees. Nor can we approve any disturbance in the verdict as to Illinois Central," and had further held that the Supreme Court of Missouri "must abide by the verdict rendered by the jury."

(2) In holding and deciding that it would reserve for future consideration, the question of the admissibility of evidence concerning the distance in which the train could be stopped, after this Honorable Court had held that rulings on the admissibility of evidence in this case must be left to the sound discretion of the trial judge, and after this court had reviewed the entire case and held that there was sufficient evidence of negligence on the part of both respondents to justify the submission of the case to the jury and further held that the jury's verdict should not be disturbed.

(3) In proceeding inconsistent with and in the evasion and annulment of the final judgment, opinion and mandate of this Honorable Court.



## **SUMMARY OF THE ARGUMENT.**

### **I.**

The Supreme Court of Missouri in its judgment and opinion of June 10, 1946, proceeded inconsistent with, and failed to follow, the judgment, opinion and mandate of this Honorable Court.

Lavender v. Kurn, ... U. S. ..., 66 Sup. Ct. 740, 90 L. Ed. 692.

### **II.**

This Honorable Court has power to give effect to its mandates and judgments.

Martin v. Hunter's Lessee, 1 Wheat. (14 U. S.) 304, 4 L. Ed. 97;

Magwire v. Tyler, 17 Wall. (84 U. S.) 253, 21 L. Ed. 576.

## ARGUMENT.

### I.

In the prior hearing of this cause this Court had before it the entire record in the case, and the same record which the Supreme Court of Missouri had before it when it rendered its judgments and opinions of June 4th, 1945 and June 10th, 1946. In the prior hearing of this cause this Honorable Court also had before it briefs of the parties to the litigation in which were discussed all the issues in the case. Arguments touching the merits of the entire case were made before this Honorable Court on March 6th and 7th, 1946. The parties to this cause discussed every issue which they considered pertinent to the inquiry of whether respondents were liable under the Federal Employers' Liability Act to the representative of the widow and children of L. E. Haney, the deceased employee.

This Honorable Court, in its opinion of March 25, 1946, thoroughly reviewed all the facts in the record bearing upon the issues in the entire case, discussed the questions raised by the parties and held in unequivocal terms that the petitioner made a submissible case and that the verdict of the jury against both respondents **should not be disturbed.**

Upon the receipt of the mandate of this Honorable Court, issued pursuant to its judgment, decree and opinion, the Supreme Court of Missouri, at the request of the respondents herein, ordered a reargument of the case and thereafter on June 10, 1946 in disobedience to the judgment, opinion and mandate of this Honorable Court, entered its judgment and opinion holding that the judgment of the Circuit Court of the City of St. Louis which this Honorable Court had previously held should not be disturbed, should be "reversed, annulled and for naught held and esteemed".

Such action of the Supreme Court of Missouri results in the flitting away of the rights of petitioner under the Constitution and Statutes of the United States, is inconsistent with the opinion of this Honorable Court of March 25, 1946, and evades and annuls the final judgment and mandate of this Honorable Court.

The Missouri Supreme Court's holding, opinion and judgment of June 10, 1946 is inconsistent and in conflict with this Honorable Court's opinion in this case of March 25, 1946, in that this Court discussed and reviewed the competency of the alleged hearsay testimony, admitted under the *res gestae* rule, of witness Drashman, and on this question held:

**"In view of the foregoing disposition of the case, it is unnecessary to decide whether the allegedly hearsay testimony was admissible under the *res gestae* rule."**

The Missouri Supreme Court in its said opinion and judgment ruled inconsistent with the above holding of this Court, by deciding this very question adverse to petitioner and ordering that the Trial Court judgment be reversed because of the admission of said hearsay testimony. This court in further considering the admissibility of evidence in this case stated and held:

**"Rulings on the admissibility of evidence must normally be left to the sound discretion of the trial judge in actions under the Federal Employers' Liability Act."**

The Supreme Court of Missouri in its said opinion ruled inconsistent to the above finding and holding of this Court by refusing to leave the admissibility of the testimony of witness Drashman under the *res gestae* rule to the discretion of the trial judge, but, on the contrary, stated and held

in its opinion that the admissibility of Drashman's testimony was incompetent, and ordered the judgment reversed as to both respondents on that account alone. This was inconsistent and in direct conflict with the holding of this Court on the very same point and issue. This Court further held in its opinion that inasmuch as there was sufficient evidence to support the verdict without the hearsay testimony, that there was no need of deciding whether the trial court abused its decision in admitting the evidence, saying:

**"But inasmuch as there is adequate support in the record of the jury's verdict apart from the hearsay testimony, we need not determine whether that discretion was abused in this instance."**

The Missouri Supreme Court's holding in its said opinion is inconsistent and in direct conflict with the last above quoted statement and holding of this Court. Instead of leaving the question of the admissibility of the hearsay testimony to the trial court, as held by this court, the Missouri Supreme Court, inconsistent with said holding, proceeded to determine that question, holding that the hearsay testimony was incompetent and reversing the judgment and verdict obtained by petitioner on that account. This Court held that inasmuch as there was sufficient evidence without the said hearsay testimony, that it need not determine whether the trial court abused its discretion in admitting such evidence. The Missouri Supreme Court, inconsistent and in direct conflict with said holding, usurped the power of the trial judge and decided that the hearsay testimony was incompetent and ordered the trial judgment reversed on that account. The Missouri Supreme Court at the conclusion of its opinion gives as the sole and only ground of reversal of the verdict and judgment the admission of the testimony of witness Drashman under

the res gestae rule. We quote from the last of their opinion:

"The judgment should be reversed and the cause remanded because of the admission of the evidence of the witness Drashman as to what the unnamed Illinois Central switchman told him. It is so ordered."

The said holding of the Missouri Supreme Court is not only inconsistent with this Honorable Court's judgment, opinion and mandate, but it is in direct conflict therewith.

The Supreme Court of Missouri, instead of adhering to and following the opinion and mandate of this Court of March 25, 1946, as it was its duty to do, quoted from, adhered to and followed its former opinion of June 4, 1945, which had been reversed by this Honorable Court.

As we said in our motion before the Supreme Court of Missouri to set aside its opinion and judgment of June 10, 1946, all the sophistry to which one may resort could not harmonize such irreconcilable and diametrically opposed opinions and judgments of the Missouri Supreme Court and of this Court.

## II.

The judgment of the Supreme Court of Missouri of June 10, 1946, in reversing the judgment of the trial court and in remanding this cause to the trial court for a new trial, is final within the meaning of Section 237 of the Judicial Code (28 U. S. C. A. 344), relating to the power of this Court to review by certiorari a final judgment or decree of the highest court of a State. The judgment of the Supreme Court of Missouri of June 10, 1946 is final and conclusive insofar as to render null and void the judgment, opinion and mandate of this Honorable Court of March 25, 1946. No further judicial proceedings are possible within the State of Missouri to modify or affect in the least the judgment of the Supreme Court of that State, of June 10,

1946, which in effect reversed, annulled and for naught held a judgment, and decision of this Honorable Court. If the doctrine is permitted to prevail that a writ of certiorari in this case is not proper because the judgment of the Supreme Court of Missouri is not final within the meaning of section 237 of the Judicial Code (28 U. S. C. A. 344) then similar action following endless and interminable trials and retrials can effectively prevent the issuance of a writ of certiorari out of this Court at all times in the future. The judgment of the Supreme Court of Missouri is final also in that it finally takes away from petitioner a jury verdict which this Honorable Court held should not be disturbed.

This Court has both statutory and inherent power to give effect to its judgments and decrees. In the early case of *Martin v. Hunter's Lessee*, 1 Wheat. (14 U. S.) 304, 4 L. Ed. 97, this Court, in a historical decision, rendered a final judgment and awarded execution to the petitioner after the Supreme Court of Virginia had refused to obey its mandate.

The case of *Magwire v. Tyler* (1873), 17 Wall. (84 U. S.) 253, 21 L. Ed. 576, is similar in many respects to the instant case. In that case plaintiff obtained judgment in the St. Louis Court of Common Pleas, investing him with title to certain real property. The Supreme Court of Missouri reversed the judgment and dismissed the cause. On writ of error this Court reversed the Supreme Court of Missouri and affirmed the trial Court (*Magwire v. Tyler*, 8 Wall. 668, 75 U. S. 650, 19 L. Ed. 420). Upon receipt of the mandate of this Court the Supreme Court of Missouri again dismissed plaintiff's cause upon the ground that under the Statutes of Missouri legal title to land could not be determined in an equity suit. On a second writ of error this Court entered a final judgment for plaintiff and awarded execution thereon. This Court said (17 Wall., l. c. 282):

“By the direction of the mandate they (Supreme Court of Missouri) were as much bound to proceed and dispose of the case in conformity to the opinion of this court as to reverse their former decree, but instead of that they entered a new decree dismissing the petition, which in effect evades the directions given by this court and practically reverses the judgment and decree which the mandate directed them to execute. Argument to show that a subordinate court is bound to proceed in such an event and dispose of the case as directed and that they have no power either to evade or reverse the judgment of this court, is unnecessary, as any other rule would operate as a repeal of the Constitution and the laws of Congress passed to carry the judicial power conferred by the Constitution into effect.

“Beyond all question this court decided every question at issue, between the parties, which it was necessary to decide to dispose of the case upon the merits, and it is clear that it is not competent even for this court, after the term expired, to review and reverse such a decree. Repeated decisions of this court have established the rule that a final judgment or decree of this court is conclusive upon the parties, and that it cannot be re-examined at subsequent term, except in cases of fraud, as there is no Act of Congress which confers any such authority. Second appeals or writs of errors are allowed but the rule is universal that they bring up only the proceedings subsequent to the mandate, and do not authorize an inquiry into the merits of the original judgment or decree. . . .”

(L. c. 284:)

“Different theories are put forth as to the ground assumed by the Supreme Court of the State in refusing to proceed with the case as directed in the mandate, and in entering the decree dismissing the petition, but the explanation given in the order of the court shows that the court decided that the petition was a pro-



ceeding to obtain equitable relief in respect to lands therein described, and that the legal title to the premises cannot be tried and adjudged in such a petition, and that inasmuch as the plaintiff had a plain adequate and complete remedy at law, the suit could not be maintained. . . .

“State courts have no power to deny the jurisdiction of this court in a case brought here for decision and sent back with the mandate of the court, which is its judgment. Such a question (that is the question whether the legal title was in the plaintiff, and whether or not he had a plain, adequate and complete remedy at law), might have been raised in the court of original jurisdiction, and perhaps it might have been here where the case was before the court upon the first writ of error, but it is clear that it was too late to raise any such question after the whole case had been decided and the cause remanded for final judgment. . . .”

(L. c. 287:)

“Justice requires that that rule shall be applied in this case, as the case has been pending more than ten years. . . .

“Unless the rule suggested is applicable in this case it is difficult to imagine a case where it would be, as the petition presents every fact constituting the cause of action, and it cannot be denied that the relief prayed is appropriate to the cause of action alleged. . . .”

(L. c. 288:)

“Such a defense was never made in the case until the first opinion of the court heretofore delivered in the case was read in court and published. In that opinion the court decided that Labeaume did not acquire the legal title to the tract. . . . Joseph Brazeau . . . acquired the legal title to the tract. . . . Directed, as the court below was to



proceed in conformity to the opinion of the court, it is quite clear that it was their duty to reverse their judgment and to grant to the plaintiff the relief prayed in his petition. . . .”

This Honorable Court then took up the question of the proper disposition to be made of the case, which question is now before the court in the instant case. In deciding that question this court in the *Magwire* case made the following disposition (l. c. 289):

“Such being the conclusion of the court, it only remains to decide what disposition shall be made of the case. Having been once before remanded and the cause being here upon a second writ of error, the court under the judiciary act may, at their discretion, remand the same a second time or proceed to a final decision of the same and award execution. . . .

Judging (l. c. 290) from the proceedings of the state court under the former mandate, and the reasons assigned by the court for their judicial action in the case, it seems to be quite clear that it would be useless to remand the cause a second time as the court has virtually decided that they cannot, in their view of the law, carry into effect the direction of this court as given in the mandate. Such being the fact, the duty of this court is plain and not without an established precedent. *Martin v. Hunter's Lessee*, 1 Wheat. 354.

. . . Suffice it to say that the rule is there settled that where the cause has once before been remanded and the state court declines or refuses to carry into effect the mandate of the Supreme Court, the court will proceed to a final decision of the same and award execution to the prevailing party; nor is that a solitary example, as the decree in *Gibbons v. Ogden*, 9 Wheat. 239, was also entered in this court.”

Judging from the proceeding in the Supreme Court of Missouri under the mandate of this Honorable Court, it is

quite clear that it would be useless to remand this cause a second time. The Supreme Court of Missouri refused to follow the mandate of this Court and ordered the judgment of the trial court reversed because of the admission of the testimony of witness Drashman under the res gestae rule, the admissibility of which this court had held was unnecessary to decide and furthermore was a matter of discretion of the trial judge. The Supreme Court of Missouri further refused to follow the mandate of this court by reserving for future consideration the question of the admissibility of evidence of the distance in which the train could be stopped, the admissibility of which evidence this court held should be left to the sound discretion of the trial judge. By such action the Supreme Court of Missouri has indicated that in its view of the law it cannot carry into effect the direction of this court as given in the mandate.

Petitioner submits that in the instant case this Honorable Court in order to give effect to its judgment, decision and opinion of March 25, 1946 as it did in the Magwire case, supra, should enter a final judgment for petitioner for the amount which the jury found he was entitled to and award him execution therefor.

Petitioner therefore prays that this court issue its writ of certiorari herein directed to the Supreme Court of Missouri, that the judgment of Division No. 1 of the Supreme Court of Missouri rendered on the 10th day of June, 1946 be reversed; that the judgment of the Circuit Court of the City of St. Louis rendered on March 3, 1944 be sustained and affirmed and that this Court render and enter its final judgment in favor of petitioner and against respondents for the amount found by the jury, with inter-

est from March 3, 1944, the date of such verdict, and costs, and that this Court award execution therefor, and grant petitioner such other and further relief as may be meet and proper.

Respectfully submitted,

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